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10 Attorneys for Plaintiff
MICHELE COSGROVE

11 UNITED STATES DISTRICT COURT

12 DISTRICT OF NEVADA

13 MICHELE COSGROVE, an individual,

Case No.:

14 Plaintiff,

COMPLAINT

15 v.

16 THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA; HARRAH'S OPERATING
17 COMPANY, INC.; HARRAH'S OPERATING
COMPANY, INC. LONG TERM DISABILITY
18 PLAN,

19 Defendants.
20 _____/

21 Plaintiff, MICHELE COSGROVE, an individual (hereinafter, simply "Plaintiff"), by her
22 attorneys, Scott E. Davis, of SCOTT E. DAVIS, P.C., and Steven J. Parsons, of LAW OFFICES OF
23 STEVEN J. PARSONS, complains against Defendants, and each of them, and as causes of action
24 against Defendants, alleges and sets forth her Complaint as follows:

25 JURISDICTION

26 1. Jurisdiction of the court is based upon the Employee Retirement Income Security
27 Act of 1974 (ERISA); and in particular, 29 U.S.C. §§1132(e)(1) and 1132(f), which provisions

1 give the U.S. District Courts jurisdiction to hear civil actions brought to recover employee
2 benefits. In addition, this action may be brought before this Court pursuant to 28 U.S.C.
3 §1331, which gives the Court jurisdiction over actions that arise under the laws of the United
4 States.

5 **PARTIES**

6 2. At all times relevant to this action, Plaintiff was a resident of Clark County,
7 Nevada.

8 3. Upon information and belief, Defendant Harrah's Operating Company, Inc.
9 (hereinafter, simply the "Company") sponsored, administered and purchased a group
10 long-term disability insurance Policy (hereinafter, simply the "Policy") which was issued and
11 fully insured by The Prudential Insurance Company of America (hereinafter, simply
12 "Prudential").

13 4. The specific Prudential group long-term disability insurance Policy is known as
14 Group Contract No. G-42111-NV. The Company's purpose in purchasing the Policy was to
15 provide disability insurance and income protection for the Company's employees.

16 5. Upon information and belief, the Policy may have been included in and part of
17 an employee benefit plan, specifically named the Harrah's Operating Company, Inc. Long Term
18 Disability Plan (hereinafter, simply the "Plan") which may have been created to provide the
19 Company's employees with welfare benefits.

20 6. At all times relevant hereto, the Plan constituted an ERISA "employee welfare
21 benefit plan" as defined by 29 U.S.C. §1002(1).

22 7. Upon information and belief, Plaintiff alleges that Prudential functioned as the
23 claim administrator of the Plan and Policy.

24 8. Pursuant to the relevant ERISA regulation, the Company, and/or the Plan may
25 not have made a proper delegation or properly vested fiduciary authority or power for claim
26 administration in Prudential.

27 9. Prudential operated under a financial conflict of interest because it fully insured

1 the Policy and made the decisions as to whether Plaintiff was disabled in her long-term
2 disability claim.

3 10. In administering Plaintiff's claim, Prudential operated under dual and conflicting
4 roles as the decision maker with regard to whether Plaintiff was disabled, and the payor of
5 benefits if it found she was disabled.

6 11. Prudential's financial conflict of interest existed and manifested because if it
7 found Plaintiff was disabled, it was then financially liable to her for the payment of long-term
8 disability benefits.

9 12. The Company, Prudential and the Plan conduct business within Clark County and
10 all events giving rise to this Complaint occurred within Nevada, in the jurisdiction of this Court.

11 VENUE

12 13. Venue is proper in this district pursuant to 29 U.S.C. §1132(e)(2) and 28 U.S.C.
13 §1391.

14 NATURE OF THE COMPLAINT

15 14. Incident to her employment, Plaintiff was a covered employee pursuant to the
16 Plan and the relevant Policy, and a "participant" as defined by 29 U.S.C. §1002(7).

17 15. Plaintiff seeks disability income benefits from the Plan and the relevant Policy
18 pursuant to §502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B), as well as any other
19 non-disability employee benefits she may be entitled to from the Plan, any other Company
20 Plan, and/or from the Company itself as a result of being found disabled in this action.

21 16. After working for the Company as a loyal employee in the occupation of a Table
22 Games Supervisor, Plaintiff became disabled from working in that occupation, and also
23 disabled from working in any occupation, on or about January 13, 2011.

24 17. Plaintiff has remained continuously totally disabled from working in any
25 occupation since January 13, 2011 due to her medical conditions.

26 18. Following the onset of her disability, Plaintiff filed a claim for short-term disability
27 benefits which was administered, reviewed and approved by Prudential, with Prudential

1 concluding she met the definition of disability for the entire period of time and maximum
2 duration of the time that short-term disability benefits could be paid.

3 19. Plaintiff's short-term disability benefits have been fully paid by Prudential and
4 those benefits have been exhausted.

5 20. Following the exhaustion of her short-term disability claim/benefits, Plaintiff then
6 filed a claim for long-term disability benefits under the relevant Policy.

7 21. Prudential made every decision regarding whether Plaintiff was disabled pursuant
8 to the terms of the relevant Policy in her long-term disability claim.

9 22. Upon information and belief, Plaintiff alleges that the relevant Prudential Policy's
10 definition of disability governing Plaintiff's long-term disability claim is as follows:

11 You are disabled when Prudential determines that:

- 12 • you are unable to perform the **material and substantial duties** of your
13 **regular occupation** due to **sickness** or **injury**; and
- 14 • you have a 20% or more loss in your **indexed monthly earnings** due to
15 that **sickness** or **injury**.

16 After 24 months of payments, you are disabled when Prudential determines that
17 due to the same sickness or injury, you are unable to perform the duties of any
18 **gainful occupation** for which you are reasonably fitted by education, training or
19 experience.

20 **Gainful Occupation** means an occupation, including self-employment, that is or
21 can be expected to provide you with an income equal to at least 50% of your
22 indexed monthly earnings within 12 months of your return to work. (original
23 emphasis).

24 23. In support of her claim for long-term disability benefits, Plaintiff submitted to
25 Prudential medical and other evidence supporting her allegation that she met any definition
26 of disability defined in the relevant Policy

27 24. Prudential found Plaintiff was disabled as defined in the Policy and approved her
long-term disability claim and paid her long-term disability benefits from July 13, 2011 through
June 1, 2017.

25 25. During the period of time Plaintiff's long-term disability claim was approved and
26 Prudential was paying her long-term disability benefits, she applied for Social Security disability
27

benefits from the Social Security Administration (hereinafter, simply the "SSA").

26. Following SSA's review, Plaintiff's claim for Social Security disability benefits was approved by SSA; she is currently receiving Social Security disability benefits and has been entitled to those benefits since July 2011.

27. On January 17, 2012, Plaintiff submitted to Prudential notification that her Social Security disability claim had been approved.

28. SSA found Plaintiff became disabled from engaging in any gainful occupation which may exist in the national economy as of January 14, 2011 and approved her disability claim on December 23, 2011 – within 11 months of Plaintiff's date of disability.

29. After reviewing the evidence in Plaintiff's SSA claim file, the SSA found Plaintiff's disabling medical conditions were so severe that they are totally disabling and preclude her from working in any gainful occupation.

30. Plaintiff's evidence was so persuasive that SSA found she met its definition of disability and was unable to work in any gainful occupation, without her even needing to attend a hearing before an Administrative Law Judge.

31. The date SSA found that Plaintiff became disabled, January 14, 2011, is the same date she became disabled in her long-term disability claim with Prudential and the date that Prudential found her disabled when it initially approved her long-term disability claim.

32. SSA's definition of disability (i.e. Plaintiff must be disabled from working in "any occupation") is a much higher and tougher standard to meet than the "Any Gainful Occupation" definition of disability in Prudential's Policy.

33. If after reviewing the evidence in Plaintiff's SSA claim file the SSA concluded that Plaintiff could perform literally "any occupation" – regardless of the salary or wages it may have paid Plaintiff, then Plaintiff would not have satisfied or meet SSA's definition of disability, and SSA would have concluded that Plaintiff was not disabled or entitled to SSA disability benefits.

34. As referenced supra, Prudential's "Any Gainful Occupation" definition of disability in its Policy requires that for Prudential to find Plaintiff was no longer disabled, it had to

1 conclude she could earn fifty-percent (50%) of her pre-disability income.

2 35. SSA's review and finding that Plaintiff is disabled from working in literally any
3 occupation (regardless of the salary or wage she could earn in that occupation) is highly
4 relevant, probative conflict of interest evidence for this Court to consider with regard the
5 unreasonableness and implausibility of Prudential's contrary decision to terminate her benefits
6 and deny her long-term disability claim.

7 36. Based on her evidence, Prudential found that Plaintiff met its "Any Gainful
8 Occupation" definition of disability beginning on July 13, 2011 and paid her long-term
9 disability benefits for six (6) years – until it terminated the benefits effective June 1, 2017.

10 37. Following a review to determine whether Plaintiff continued to meet the "Any
11 Gainful Occupation" definition of disability in the Policy, Prudential terminated her disability
12 claim and benefits, without any medical documentation to support its allegation that Plaintiff's
13 medical conditions had improved in such a way that she could return to an occupation and
14 earn at least Fifty-percent (50%) of her Indexed Monthly Earnings, as defined in the Policy.

15 38. In a letter dated May 24, 2017, Prudential informed Plaintiff it was terminating
16 her long-term disability benefits beyond that date after finding she no longer met the "Any
17 Gainful Occupation" definition of disability in the Policy.

18 39. Pursuant to 29 U.S.C. §1133, Plaintiff timely appealed Prudential's May 24,
19 2017 termination of her benefits, and submitted additional medical and vocational evidence
20 supporting her appeal and her allegation that she is disabled and meets any definition of
21 disability in the Policy.

22 40. In support of her claim, Plaintiff submitted to Prudential a November 20, 2017
23 narrative letter authored by her treating board certified internal medicine physician and
24 specialist who opined,

25 "In my many opportunities to observe [Plaintiff], she has been unable to
26 maintain attention or sit for prolonged periods of time and requires long rest
27 periods...my conclusion that the patient could not engage in any more than 2
hours of continuous activity mental or physical in a workday still remains."

1 41. Plaintiff submitted to Prudential an October 30, 2017 narrative letter from
2 another one of her treating medical professionals who opined, "...I do not foresee her being
3 able to work any job with all of her medical problems."

4 42. Further supporting her claim, Plaintiff submitted to Prudential a Vocational
5 Report from a certified vocational expert dated November 17, 2017, who after interviewing
6 Plaintiff and reviewing the evidence in Plaintiff's claim, along with the "Any Gainful Occupation"
7 definition of disability set forth in the Policy concluded, "[Plaintiff] is unable to perform any
8 occupation which she would earn at least 50% of her previous income because she is unable
9 to perform or sustain any gainful work even at the Sedentary level."

10 43. On appeal, as part of its review of Plaintiff's claim for long-term disability
11 benefits, Prudential obtained medical-records only "paper reviews" from two (2) medical
12 professionals of its choosing, named Leonid Topper, M.D. ("Dr. Topper") and, Frank Polanco,
13 M.D., ("Dr. Polanco") who are consulting physicians for MES Solutions.

14 44. MES Solutions has a long and extensive business relationship and history of
15 providing biased medical records reviews of claimants of benefits that favor insurance
16 companies, dating back at least *10 years*, in *Garrison v. Aetna Life Ins. Co.*, 558 F.Supp. 2d
17 995, 1002 (C.D. Cal. 2008)(Aetna abused discretion terminating benefits after relying on
18 records review from an MES doctor).

19 45. In other cases, the Court reversed the denial of benefits after an insurance
20 company relied on a MES Solutions doctor's review, see *Maier v. Aetna Life Ins. Co.*, 186
21 F.Supp. 3d 1117 (W.D. Wash. 2016) and, *Mason v. Fed Express Corp.*, 165 F.Supp. 3d 832
22 (D. Alaska 2016).

23 46. Due to its long business relationship with the disability insurance industry, MES
24 Solutions has no incentive to implement a system or process that allows it to regularly and
25 consistently monitor the independence and impartiality of the medical professionals it retains
26 to perform the type of medical-records only "paper reviews" that it provided to Prudential in
27 Plaintiff's claim.

1 47. Upon information and belief, Plaintiff asserts Drs. Topper and Polanco are long-
2 time medical consultants for Prudential, MES Solutions and/or the disability insurance industry.

3 48. Due to their long-time relationship with Prudential, MES Solutions and/or the
4 disability insurance industry, Drs. Topper and Polanco have conflicts of interest and incentives
5 to protect their own consulting relationships with Prudential, MES Solutions and/or the
6 disability insurance industry by providing medical-records only “paper reviews,” which
7 selectively review or ignore evidence such as occurred in Plaintiff’s claim, in order to provide
8 opinions and report(s) which are favorable to insurance companies such as Prudential, and
9 which unreasonably supported the denial of Plaintiff’s claim.

10 49. In a letter dated February 1, 2018, Prudential informed Plaintiff it was denying
11 her claim for long-term disability benefits, “...because we determined the medical information
12 received no longer supported impairment which would prevent her from performing the
13 material and substantial duties of her regular occupation.”

14 50. Pursuant to 29 U.S.C. §1133, Plaintiff timely appealed Prudential’s February 1,
15 2018 denial of her claim, and submitted additional medical, vocational and lay-witness
16 evidence supporting her appeal and her allegation that she is disabled and meets any
17 definition of disability in the Policy.

18 51. In support of her claim for long-term disability benefits, Plaintiff submitted to
19 Prudential an October 25, 2018 narrative letter authored by her treating board certified
20 internal medicine physician and specialist who opined, “...[Plaintiff] remains incapable of
21 returning to full-time work.”

22 52. Further supporting her claim, Plaintiff submitted a September 14, 2018
23 Addendum Vocational Report from the certified vocational expert who had previously
24 interviewed her on November 17, 2017. After interviewing Plaintiff again and reviewing
25 Plaintiff’s aforementioned evidence, along with the “Any Gainful Occupation” definition of
26 disability set forth in the Policy, in his report, the vocational expert concluded it remained his
27 vocational opinion that, “...[Plaintiff] does meet Prudential’s Policy’s definition of disability for

1 long term disability benefits. This benefit should be reinstated and based on the available
2 evidence, should never have been terminated by Prudential.”

3 53. Plaintiff also submitted updated medical records from each of her treating
4 medical professionals and a list of her current medications, as well as the significant and
5 negative side effects they cause her to experience, and the impact they have on her ability to
6 work in any occupation and also in any work environment.

7 54. Plaintiff also submitted to Prudential three (3) sworn affidavits authored by
8 herself, her husband and her daughter, who all confirmed Plaintiff continues to be unable to
9 work in any occupation and that her medical conditions had not improved in any meaningful
10 way since the date she originally became disabled.

11 55. Upon information and belief, Plaintiff alleges that as part of Prudential’s review
12 of her claim, it obtained two (2) addendum/second medical-records only “paper reviews” of
13 Plaintiff’s claim from Drs. Topper and Polanco.

14 56. Pursuant to 29 C.F.R § 2560.503-1(h)(3)(v), Prudential violated ERISA,
15 committing a procedural violation in retaining the same reviewing medical professionals, Drs.
16 Topper and Polanco, to review Plaintiff’s claim at two separate levels of its review.

17 57. As alleged *supra*, Drs. Topper and Polanco are long time medical consultants
18 and medical-record reviewers for Prudential and/or the disability insurance industry and have
19 incentives to protect their own consulting relationships with Prudential and/or the disability
20 insurance industry by providing medical records only paper reviews, which selectively review
21 or ignore evidence such as occurred in Plaintiff’s claim, in order to provide opinions and
22 report(s) which are favorable to Prudential and which supported the denial of Plaintiff’s claim.

23 58. Dr. Topper’s relationship with the disability insurance industry dates back at least
24 10 years where he opined in *Rogers v. Metro. Life Ins. Co.*, 655 F. Supp. 2d 1081 (N.D. Cal.
25 2009), the Plaintiff was not disabled.

26 59. A quick search of Lexis finds 27 cases in federal court since 2009 where Dr.
27 Topper is referenced as having performed a medical records reviews for many different

1 disability insurance companies, including Prudential (see *Prezioso v. Prudential Ins. Co. Am.*
2 748 F.3d 797, 802 (8th Cir. 2014)), where he opines the claimant is not disabled.

3 60. A quick search of Lexis finds a number of ERISA disability cases in federal court
4 since 2011 where Dr. Polanco has performed medical records reviews for many different
5 disability insurance companies and in those reviews, he opines the claimant is not disabled.

6 61. Implausibly, Drs. Topper and Polanco, whose bias is palpable throughout their
7 reports as indicated by Prudential's final denial, are the only physicians who concluded Plaintiff
8 had no work limitations.

9 62. Notably, Drs. Topper and Polanco are the only *physicians in the record who*
10 *never personally examined, evaluated or spoke with Plaintiff* about her disabling medical
11 conditions and her disability claim.

12 63. Prudential's denial of Plaintiff's claim based on Drs. Topper and Polanco's
13 medical-records only "paper reviews" and the opinions they rendered in their reports violates
14 ERISA because Prudential's review was not "full and fair" as ERISA regulations require.

15 64. In a letter dated December 6, 2018, Prudential informed Plaintiff it was denying
16 her claim for long-term disability benefits, after it concluded she did not meet the "Any Gainful
17 Occupation" definition of disability in the Policy.

18 65. Prior to rendering its December 6, 2018 final denial in Plaintiff's claim,
19 Prudential unlawfully never shared with Plaintiff, or her treating medical professionals (who had
20 all examined/evaluated her personally and opined she was disabled and unable to work in any
21 occupation), the medical-records only "paper reviews" authored by Drs. Topper and Polanco,
22 so that the physicians that had examined and treated Plaintiff could respond to their reports
23 and opinions by addressing the issues and/or deficiencies they and Prudential alleged existed
24 in Plaintiff's claim.

25 66. Prudential's failure to provide Plaintiff and her treating medical professionals with
26 its reviewing doctors' – Drs. Topper's and Polanco's – reports before issuing its final denial was
27 unlawful pursuant to precedent and the law as interpreted by the U.S. Court of Appeals for the

1 Ninth Circuit, and unreasonable.

2 67. Prudential's action in not providing Plaintiff with a copy of Drs. Topper's and
3 Polanco's reports before it denied her claim so she and her medical professionals could
4 respond to them, is not the action a similarly situated un-conflicted ERISA fiduciary would have
5 taken.

6 68. Prudential's failure to provide Drs. Topper's and Polanco's reports to Plaintiff so
7 she and her medical professionals could respond to them as she and they believed was
8 necessary and appropriate in order to provide Prudential with complete picture of her disabling
9 medical conditions and limitations, violated ERISA and is a breach of the fiduciary duty it owed
10 her.

11 69. An un-conflicted fiduciary would have shared Drs. Topper's and Polanco's reports
12 with Plaintiff and her medical professionals so they could respond to them, and in allowing
13 Plaintiff to participate in Prudential's review process, Prudential would have lawfully engaged
14 her in a dialogue so she could have cured any alleged deficiencies that it alleged existed in her
15 claim in its denial.

16 70. Had Prudential engaged Plaintiff in a dialogue regarding any alleged deficiencies
17 in her claim, Plaintiff and her medical professionals would have had an opportunity to perfect
18 her claim as required by ERISA and Ninth Circuit law, so her benefits could have been
19 approved and reinstated by Prudential, rather than denied.

20 71. As set forth by Prudential in its December 6, 2018 final denial, the deficiencies
21 it alleged existed in Plaintiff's claim were not inconsequential to Prudential, as Prudential
22 asserted the deficiencies were the rationale and the basis which supported Prudential's denial
23 of her claim.

24 72. As Plaintiff's ERISA fiduciary, it was critical for Prudential to provide Plaintiff and
25 her medical professionals with an opportunity to respond to Drs. Topper's and Polanco's paper
26 review reports as well as what Prudential believed were the alleged deficiencies in her claim
27 at a time when it mattered to Plaintiff under Ninth Circuit law, which is *before* Prudential

1 rendered its final denial.

2 73. Prudential's failure to provide Plaintiff and her treating medical professionals with
3 the opportunity to respond to Drs. Topper's and Polanco's reports is an ERISA procedural
4 violation, and precluded Prudential from providing Plaintiff with a "full and fair" review.

5 74. Prudential's action in not providing Drs. Topper's and Polanco's reports to her
6 and her medical professionals violated ERISA and Ninth Circuit case law as held in *Salomaa*
7 *v. Honda Long Term Disability Plan*, 642 F.3d 666, 680 (9th Cir. 2011):

8 "The plan evidently based its denial in large part on review of Salomaa's
9 file by two physicians, one for the first denial, **another for the final denial**. They
10 both wrote their appraisals for the plan administrator. Yet the plan failed to
11 furnish their letters to Salomaa or his lawyer. The regulation, quoted above,
12 requires an ERISA plan to furnish 'all documents, records, and other information
relevant for benefits to the claimant.' **A physician's evaluation provided to the
plan administrator falls squarely within this disclosure requirement**" (bold and
emphasis added).

13 75. In Prudential's final denial dated December 6, 2018, notwithstanding Plaintiff's
14 aforementioned evidence, which clearly proved she met and continues to meet "Any Gainful
15 Occupation" definition of disability in the Policy, and that her medical conditions had not
16 improved in any way since she initially became disabled in 2011, Prudential notified her it had
17 made a final denial in her claim for long-term disability benefits.

18 76. In its final denial dated December 6, 2018, Prudential notified Plaintiff she had
19 exhausted her administrative levels of review and that she could file a civil action lawsuit in
20 federal court pursuant to ERISA.

21 77. Prudential's December 6, 2018 final denial letter is clear evidence that it not
22 only abused its discretion, but also breached its fiduciary duty to Plaintiff by failing to provide
23 a "full and fair review," as required by ERISA.

24 78. During its review, Prudential either negligently, or intentionally committed
25 numerous ERISA procedural violations as identified herein which paved the way and allowed
26 Prudential to deny Plaintiff's claim, even though ERISA's regulations were enacted to protect
27 employee/beneficiary's rights such as Plaintiff's.

1 79. Prudential's ERISA violations include but are not limited to, completely failing
2 to credit, reference, consider, and/or selectively reviewing and de-emphasizing most, if not all
3 of Plaintiff's reliable evidence which proved that she met the "Any Gainful Occupation"
4 definition of disability in the Policy.

5 80. In evaluating Plaintiff's claim on appeal, Prudential owed her a fiduciary duty and
6 had an obligation pursuant to ERISA to administer it, "solely in [her] best interests and other
7 participants" which it failed to do.¹

8 81. Prudential failed to adequately investigate and failed to engage Plaintiff in a
9 dialogue during the appeal of her claim with regard to what evidence was necessary so Plaintiff
10 could perfect her claim/appeal so she could prove that she is disabled as that term is defined
11 in the Policy.

12 82. Prudential's failure to investigate the claim and to engage in this dialogue, and
13 failure to ask for and/or obtain the evidence it believed was necessary and critical to cure any
14 deficiencies so Plaintiff could perfect and have her claim approved by Prudential, is particularly
15 egregious given the nature and severity of Plaintiff's disabling medical conditions which
16 included objective medical findings as well as her subjective medical complaints which both
17 proved she was disabled as defined in its Policy.

18 83. Prudential's failure to engage Plaintiff in a dialogue during its review of her claim
19 is evidence that Prudential's biased review and denial of Plaintiff's claim was motivated by its
20 financial conflict of interest.

21 84. Plaintiff asserts Prudential's review was neither full nor fair because it violated
22 _____

23 ¹It sets forth a special standard of care upon a plan administrator, namely, that the
24 administrator "discharge [its] duties" in respect to discretionary claims processing "solely in
25 the interests of the participants and beneficiaries" of the plan, § 1104(a)(1); it simultaneously
26 underscores the particular importance of accurate claims processing by insisting that
27 administrators "provide a 'full and fair review' of claim denials," *Firestone*, 489 U.S., at 113,
109 S. Ct. 948, 103 L. Ed. 2d 80 (quoting § 1133(2)); and it supplements marketplace and
regulatory controls with judicial review of individual claim denials, see § 1132(a)(1)(B). *Metro.*
Life Ins. Co. v. Glenn, 128 S. Ct. 2343, 2350 (U.S. 2008).

1 ERISA, specifically, 29 U.S.C. § 2560.503-1, and was an abuse of any discretion that may
 2 be afforded to it in the Policy for many reasons including, but not limited to: failing to credit
 3 Plaintiff's reliable evidence including not giving significant, or even proper weight to the SSA's
 4 rationale which resulted in SSA's decision to approve her disability claim; by failing to have
 5 Plaintiff's claim reviewed by a truly independent medical professional; by having Plaintiff's
 6 claim reviewed by the same medical professionals at two separate levels of review; by failing
 7 to obtain an Independent Medical Examination or a Functional Capacity Evaluation when the
 8 Policy allowed for one and Plaintiff's disabling medical conditions, her subjective complaints,
 9 and work limitations could not easily be understood with only a medical-records "paper
 10 review," which raises legitimate questions about the thoroughness and accuracy of
 11 Prudential's review and its denials; by providing a biased and one sided review of Plaintiff's
 12 claim that failed to consider all the evidence submitted by her; by de-emphasizing medical and
 13 other evidence which supported Plaintiff's claim and its approval; by disregarding and/or failing
 14 to consider Plaintiff's disabling subjective and self-reported complaints/symptoms/limitations;
 15 by failing to consider the combined effect that all of her medical conditions and resulting
 16 limitations documented in her medical evidence would have on her ability to work in any
 17 gainful occupation; by abdicating its ERISA fiduciary duty and retaining a biased company such
 18 as MES Solutions to be involved in the review of Plaintiff's claim; by abdicating its fiduciary
 19 duty and allowing MES Solutions to retain biased doctors such as Drs. Topper and Polanco to
 20 be involved in the review of her claim; by failing to engage Plaintiff in a dialogue so she and
 21 her medical professionals could respond to Prudential's reviewing medical professionals' – Drs.
 22 Topper's and Polanco's – reports by submitting the necessary evidence to perfect her claim
 23 so she could prove she is "Disabled" from working in "Any Gainful Occupation" as those terms
 24 are defined in the Policy; and by failing to consider the impact the side-effects that Plaintiff's
 25 medications would have on her ability to engage in any occupation.

26 85. Plaintiff asserts a reason Prudential provided an unlawful review which was
 27 neither full nor fair and that violated ERISA, specifically, 29 U.S.C. § 2560.503-1, is due to

1 its financial conflict of interest that manifested as a result of the dual roles Prudential
2 undertook as the decision maker and the payor of benefits.

3 86. Prudential's conflict of interest provided it with a financial incentive to deny
4 Plaintiff's long-term disability claim, because every dollar it saved in not paying Plaintiff the
5 disability benefits she deserves and is entitled to, now represents a dollar of profit for
6 Prudential.

7 87. Prudential's actions are similar to the conflicted and unlawful review provided
8 by another insurance company where the Ninth Circuit stated, "The plan with a conflict of
9 interests also has a financial incentive to cheat." *Salomaa v. Honda Long Term Disability Plan*,
10 637 F.3d 958, 970 (9th Cir. 2011).

11 88. Prudential's financial conflict of interest manifested when it denied Plaintiff's
12 claim because Prudential saved over a hundred and fifty thousand dollars (\$150,000) in
13 unpaid benefits to her, otherwise due her.

14 89. Plaintiff is entitled to discovery regarding Prudential's aforementioned conflicts
15 of interest, bias and business relationships referenced herein, as well as the conflicts of
16 interest of any third-party vendor (including but not limited to MES Solutions) hired by
17 Prudential and any medical professional (including but not limited to Drs. Topper and Polanco)
18 retained by Prudential and/or Prudential's third-party vendor to review Plaintiff's claim, and of
19 any individual, medical professional or otherwise, who reviewed any evidence and/or
20 participated in the review of her claim.

21 90. The Court may allow discovery in order to properly weigh and consider extrinsic
22 evidence regarding the nature, extent and effect of any conflict of interest and/or of any ERISA
23 procedural violation which may have impacted or influenced Prudential's decision to deny her
24 long-term disability claim.

25 91. This Court in *Hertz v. Hartford Life & Accident Ins. Co.*, 991 F. Supp 2d 1121,
26 1136 (D. Nev 2014), reversed the denial of an ERISA disability claim by a conflicted insurance
27 company after allowing discovery into various conflicts of interest and bias. Plaintiff's discovery

1 revealed that in an extremely high percentage of ERISA disability claims, the disability
2 insurance company's third-party vendor and its reviewing doctors had opined that a claimant
3 was able to work and was not disabled:

4 "Accordingly, MLS found that approximately 95% of all claimants could
5 perform some type of work. During that same time frame, Dr. Rim reviewed
6 fourteen (14) claims for Hartford...Significantly, of those fourteen (14) claims
7 reviewed, Dr. Rim did not find that a single claimant was completely unable to
8 perform any type of work.

9 ***"Accordingly, Dr. Rim found that 100% of all claimants could perform
10 some type of work."***

11 "The Court finds these statistics strongly suggest that both MLS and Dr.
12 Rim harbored a significant bias towards finding a claimant capable of performing
13 some type of work. See *Montour*, 588 F.3d at 634 (noting relevance of
14 statistics regarding Hartford's rate of claims denials or how frequently it
15 contracts with the file reviewers it employed in that case to the issue of bias)."
16 (emphasis added).

17 92. With regard to whether Plaintiff meets the "Any Gainful Occupation" definition
18 of disability set forth in the Policy, the Court should review the evidence in Plaintiff's claims *de*
19 *novo*, because even if the Court concludes the Policy confers discretion, the unlawful violations
20 of ERISA committed by Prudential as referenced herein are so flagrant that it justifies *de novo*
21 review.

22 93. Regardless of the standard of review, Plaintiff is entitled to discovery regarding
23 the conflicts of interest, bias and ERISA procedural violations referenced herein.

24 94. As a direct result of Prudential's decision to terminate Plaintiff's disability claim
25 and benefits, she has been injured and suffered damages in the form of lost long-term
26 disability benefits, in addition to other potential non-disability employee benefits she may be
27 entitled to receive through or from the Plan, from any other Company Plan and/or the
28 Company as a result of being found disabled in this matter.

29 95. Upon information and belief, Plaintiff alleges other potential non-disability
30 employee benefits may include but not be limited to, health insurance (coverage) and other
31 insurance related coverage or benefits, retirement benefits or a pension, life insurance
32 coverage and/or the waiver of the premium on a life insurance policy providing coverage for

1 her and her family/dependents.

2 96. Plaintiff seeks any and all employee benefits, including but not limited to
3 disability benefits and any other benefit she may be entitled to and due from Defendants as
4 a result of being found disabled in this matter.

5 97. Pursuant to 29 U.S.C. §1132, Plaintiff is entitled to recover unpaid disability and
6 non-disability employee benefits, prejudgment interest, reasonable attorney's fees and costs
7 from Defendants.

8 98. Plaintiff is entitled to prejudgment interest at the legal rate within Nevada law,
9 or at such other rate as is appropriate to compensate her for the losses she has incurred as
10 a result of Defendants' nonpayment of benefits.

11 **WHEREFORE**, Plaintiff prays for judgment as follows:

12 1. For an Order finding that the evidence in Plaintiff's claim is sufficient to prove
13 that she met and continues to meet the "Any Gainful Occupation" definition of disability set
14 forth in the relevant Plan and/or Policy, and that she is entitled to disability benefits, and any
15 other non-disability employee benefits that she may be entitled to as a result of that Order,
16 from the date she was first entitled to but was denied these benefits through the date of
17 judgment with prejudgment interest thereon;

18 2. For an Order directing Defendants to continue paying Plaintiff the claimed
19 benefits until such a time as she meets the conditions for the termination of benefits;

20 3. For attorney's fees and costs incurred as a result of prosecuting this suit
21 pursuant to 29 U.S.C. §1132(g); and

22 ...

23 ...

24 ...

25 ...

26 ...

27 ...

1 4. For such other and further relief as the Court deems just and proper.

2 Dated: Friday, January 18, 2019.

3 Scott E. Davis
4 SCOTT E. DAVIS, P.C.
5 and
6 LAW OFFICES OF STEVEN J. PARSONS

7 /s/ Steven J. Parsons
8 STEVEN J. PARSONS
9 Nevada Bar No. 363

10 Attorneys for Plaintiff
11 **MICHELE COSGROVE**